

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Civil Suit No: 1861 of 2009**

**IN THE MATTER of The Administrative Justice  
Act Cap. 109B**

**AND IN THE MATTER of An Application for  
Judicial Review**

**BETWEEN:**

**VINCENT BRATHWAITE**

**CLAIMANT**

**AND**

**ATTORNEY-GENERAL  
CHIEF PERSONNEL OFFICER  
PUBLIC SERVICE COMMISSION**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT**

**Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court**

**Date of Hearing: 2020: 26<sup>th</sup> November**

**Date of Decision: 2021: 27<sup>th</sup> September**

**Appearances:**

**Mr. Ajamu Boardi for the Claimant.**

**Mr. Jared Richards and Mrs. Roselyn Marshall-Mapp for the Defendants.**

*Judicial Review – Public Service – Acting Appointment other than as prelude to substantive appointment – Regulations 12 and 13 of the Service Commission (Public Service) Regulations, 1978 – Employment and Recruitment Code, Schedule I of Public Service Act, 2007 – Amenability of Review of Acting Appointments.*

## **DECISION**

[1] This is a claim for Judicial Review, filed in September, 2009, which seeks a number of declarations and orders pertaining to the Claimant's employment as an Environmental Health Assistant, in the Environmental Health Department of the Government of Barbados. The Claimant sought declarations in respect of what he terms as the denial on named occasions, of the opportunity to act in higher posts, and albeit, not worded in such terms, corresponding orders of certiorari, to quash the appointments of officers whom he alleges were unlawfully appointed to acting appointments ahead of him. The Claimant also sought an order of mandamus requiring the Defendants to fill a vacant post of Environmental Health Officer in accordance with the law, including giving effect to his legitimate expectation to be so appointed; damages, and costs.

### **Background**

[2] The relevant factual background to the matter is that the Claimant was temporarily appointed to the post of Environmental Health Assistant II (EHAI) with effect from September, 2000, and in October, 2006 he was permanently appointed to that position. According to the Claimant, above his post of EHAI, was EHA I, followed by Environmental Health Officer II (EHOII) and EHO I.

The Claimant obtained a two year associate degree in Environmental Health in July, 2005 and a 1 year post diploma in Meat and Other Foods in August, 2007. There was no issue taken by the Defendants with the Claimant's qualifications. The gravamen of the Claimant's case turns on what he submits was the Defendants' failure to adhere to the statutory regime for upward mobility in his Department, as well as the established practice in that regard. The Defendants' failure to adhere to the statutory regime for promotions and award of acting appointments was submitted to be ultra vires the applicable provisions, or in the alternative, contrary to the Claimant's legitimate expectation to be appointed, based on the established practice.

- [3] The Defendants' position was firstly that the Claimant's application for judicial review was misconceived. Firstly, insofar as it was directed towards a decision to '*deny the applicant an opportunity to act*' in the higher post of EHO, the Defendants submit that the Claimant has not and cannot point to any decision or position of the Defendants to deny him an opportunity to act in a higher post, therefore the remedies sought of a declaration and certiorari in that regard do not arise. Further, that according to the 1978 Service Commissions (Public Service) Regulations ('the 1978 Regulations'), and the Employment and Recruitment Code, Schedule I of the Public Service Act,

Cap. 29 ('the Act'), appointments including appointments to act, are assessed on additional bases of merit and experience, and not only seniority.

- [4] It is alleged that according to the evidence, the officers named by the Claimant as having been unlawfully appointed to act instead of him, were in fact senior to the Claimant, based upon the prescribed rules for determining seniority. Finally, it was the Defendants' position that there could be no legitimate expectation to have been appointed to act in the higher post given the absence of any express promise in his favour; and in the absence of any evidence of any established procedure which would have entitled him to the acting appointments claimed.

### **The Evidence**

- [5] The evidence<sup>1</sup> upon which the Claimant advances his Claim for review is based on the following alleged facts and/or circumstances:-
- (i) The Claimant held temporary appointment as EHA(II) from November, 2000;
  - (ii) The Claimant was appointed as EHA(II) wef 1<sup>st</sup> October, 2006;
  - (iii) In the Department, promotion from EHA(II) to EHA(I) occurs upon 10 years' service as EHA(II);

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<sup>1</sup> With the permission of the Court and absence of objection by Counsel for the Defendants, the Claimant submitted by way of affidavit after the hearing concluded, copies of the documents referred to in his affidavits filed in support of the claim. Documents referred to in the Claimant's affidavit had in any event been put into evidence by the 2<sup>nd</sup> Defendant

- (iv) For an EHA(I) or (II) to act as EHO(I) or (II) the officer must have obtained qualification of both a 2 year associate degree in Basic Environmental Health and a 1 year post-diploma in Meat and Other Foods;
- (v) The Claimant obtained the qualifications stated in paragraph (iv) above, namely, the associate degree on July 31, 2005; and his post-diploma on August 31, 2007;
- (vi) To the best of the Claimant's knowledge, information and belief
  - (a) since 1986, eligibility to act in the EHO(II) position was determined by seniority;
  - (b) since 1986, the most senior EHA(II) or EHA(I) with the qualifications, has been afforded the opportunity to act in any vacant EHO(II) posts;
  - (c) since 1986, the practice was that seniority was determined by appointment date with the employee with the earliest appointment date being the most senior;
  - (d) since 1986, if two or more employees have the same appointment date, the employee obtaining the required qualifications earliest, is the most senior;

- (e) there is only one EHA(II) senior to the Claimant who was not already acting in an EHO(II) position;
- (f) (At the time of the filing of the claim) there were only two EHO(I) vacancies in the Department, arising from the departure of AO by resignation in May, 2009 and CL, arising from pre-retirement leave in June, 2009.
- (vii) Since 1986, a person acting in or holding an EHO(II) post for at least 4 years is appointed as an EHO(I);
- (viii) In accordance with the past practice, laws and regulations of the public service, the Claimant was eligible to fill the two EHO(I) vacancies [namely those mentioned at paragraph (vi)(f) herein], however notwithstanding those laws and the Claimant's expectation based on such laws and practice, he was not afforded the opportunity to act in those two vacant EHO(I) posts;
- (ix) In March, 2009 the Claimant was informed by the Principal Personnel Officer that he was going to replace an EHO(I) officer who was proceeding on extended vacation for 105 days. However, he was subsequently informed by the Principal Personnel Officer that he could no longer be given the acting appointment as he would have superseded other persons;

- (x) As regards other examples of the practice, the Claimant says
- (a) Officer LB who ranked below him in seniority having obtained her 2 year associate degree three years after he did, and who did not hold the post-diploma certificate, was placed in a temporary vacant EHO(II) post;
  - (b) The Claimant registered his objection in writing and was subsequently afforded an opportunity to act in a temporarily vacant EHO post from November, 2008 – February, 2009;
  - (c) As a result of the officer LB's placement ahead of him in the temporary EHO(II) which was for 9 months instead of his acting stint which was for 3 months, the Claimant lost approximately \$3500 as well as enhancement of his skills and experience;
  - (d) The Claimant to the best of his knowledge, information and belief says
    - One A McD, an EHA(II) with the same appointment date but who is junior to him having obtained qualification three years after, is acting in an EHO(II) position ahead of him; and
    - One KA L, appointed as EHA(II) in 2007 and therefore junior to him, is acting in an EHO(II) position, ahead of him.

[6] As a consequence of the above allegations, the Claimant seeks the relief by way of declarations that the denials of opportunities for him to act as EHO(II) and the appointment of officers junior to him as such to act, is unlawful and should be quashed. The Defendants responded to such allegations<sup>2</sup> as follows:-

(i) The Claimant's categorisation of the posts of EHA(II), EHA(I), EHO(II) and EHO(I) as being in ascending order is accepted, and the qualifications for such posts, according to the Civil Establishments (Qualifications) Order ('the Qualifications Order') is as follows:-

- The required qualification for the post EHA(I) (by virtue of the Civil Establishment (Qualifications) Order is 5 years as an EHA(II) plus completion of a 3 month course in Public Health; OR 10 years or more as an EHA(II);
- The qualification for EHO(II) as set out in the Civil Establishment (Qualifications) Order, is – an Associate Degree in Environmental Health;
- The Qualification for EHO(I) as set out in the said Order, is – the Associate Degree in Environmental Health, plus the Certificate of Inspection of Meat and Other Foods, as well as at least four years as an EHO(II).

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<sup>2</sup> By the affidavits of Gail Atkins, then Chief Personnel Officer (filed on 23 December, 2009), and Gail Best-Winfield, then Principal Personnel Officer (filed on 15 January, 2010).

- (ii) The practice in the Environmental Health Department regarding appointments would have been in accordance with Regulations 12 and 13 of the Service Commissions (Public Service) Regulations, 1978, which required considerations of qualifications, merit and others, in addition to seniority. Also that from 31 December, 2007, the 1<sup>st</sup> schedule to the Public Service Act, No. 47/2007 listed other factors besides seniority;
- (iii) In relation to seniority, the obtaining of qualifications counts towards seniority where the qualification in question is a requirement for the appointment, but otherwise, seniority is determined by date of continuous service;
- (iv) In relation to the allegation that in March, 2009 Ms. Best Winfield resiled from a notification to Claimant that he would take up an acting appointment as EHO(II) at a different station, Ms. Best Winfield stated that the Claimant having been notified of the acting appointment, objected to leaving his usual place of employment and had to be told that in order to take up the acting appointment, he would have to do so at the place where the vacancy existed.
- (v) Ms. Best Winfield declined recollection of having any conversation with the Claimant regarding her misunderstanding of the rules of

promotion or that the Claimant would have superseded officers senior to him, were he afforded the acting EHO(I) position previously offered.

### **Submissions**

[7] The grounds for judicial review listed by the Claimant spanned almost the entire gamut of available grounds under the Administration of Justice Act. In argument however, the grounds relied on were legitimate expectation and unreasonable/improper exercise of discretion. In relation to legitimate expectation, the Claimant's starting position was that within the Environmental Department, seniority was determined in a particular manner, namely by appointment date, with the employee holding the earliest appointment date being the most senior; and where two or more officers hold the same appointment date, the officer obtaining qualifications is considered the most senior. Further, the Claimant alleges that there was a long-standing practice that the most senior EHAII would be appointed to act in vacant EHO posts, so much so that the practice created a legitimate expectation in his favour.

[8] In relation to his case, the Claimant contended that he was one of the most senior EHA II's in the Department, therefore it was expected that he would have been one of the first officers chosen to act in vacant higher EHO posts. However, officers less senior to him were afforded opportunities to act in the

higher post of EHO II ahead of him. The Claimant specifically pleaded two incidences whereby persons he considered junior to him were afforded the opportunity to act in the higher post ahead of him, in breach of his legitimate expectation. Counsel for the Claimant referred to the well-known **Leacock v Attorney-General**<sup>3</sup> per Sir David Simmons CJ in which the court found a legitimate expectation to have arisen in relation to the grant of study leave to police officers, based upon a long-standing practice in the Police Force. In relation to the two officers appointed ahead of him the Claimant asserts that they possessed no greater qualification than he did and that contrary to what they alleged, the Defendants could not establish that those officers were of greater merit than the Claimant as there was no system in place for assessing merit.

[9] In this regard Counsel sought to draw a parallel in the absence of any performance-based criteria for selection for acting appointments, with the rejection of the Defendants' complaint of poor performance in *Leacock*, due to a lack of evidence submitted at trial to support such a complaint.

Further, the fact that the Public Service Act sets out a regime for assessing performance was to be of no avail as there was never any such appraisal conducted and the fact remained of a practice of appointments to act on the

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<sup>3</sup> Barbados Supreme Court Suit No. 1712 of 2005 C.A.

basis of seniority. The appointment of the two officers ahead of the Claimant is submitted to have been arbitrary and unreasonable. The Claimant filed a supplemental affidavit in January, 2021 from which he sought to adduce evidence of the practice of appointments in the Department. At the trial the Claimant was granted permission to file an affidavit to attach documentation which he had referred to in his evidence and belatedly received from the Defendants. The Court however, is not considering evidence regarding any practice which had not hitherto been pleaded or included in evidence prior to the day of the hearing.

- [10] The evidence before the Court therefore remains the two incidents pleaded by the Claimant in relation to officers junior to him who he submitted were appointed ahead of him. The relief claimed was for the Court to declare the Claimant's entitlement to have been entitled to act in lieu of those persons, to quash their appointments, an award of damages, and an order of mandamus to compel the Defendants to fill the vacant higher posts according to law and in accordance with the Claimant's legitimate expectation regarding his seniority. In relation to the award of damages Counsel for the Claimant submits that the willingness of the courts in Barbados to award compensatory damages in

judicial review claims has been long established.<sup>4</sup> The Claimant in this case would have suffered clear prejudice from the denial of acting appointments, in the form of lost wages which would have been earned from such acting appointments.

[11] Counsel for the Defendants filed no closing submissions. The matter being a dated one however, there were preliminary written submissions by prior Counsel on record for the Defendants, filed in April and May of 2010. These submissions however would not have taken into account any evidence presented to the Court or addressed the Claimant's legal arguments. Given that the matter is one in public law and of general public interest, the Court is nonetheless obliged to fully consider the evidence and law relative to the Defendants' position, even without the assistance of Counsel. The Defendants' evidence was in effect that seniority was not the only factor to be taken into account in determining acting appointments.

With specific reference to the Claimant, the Defendants' position was that both officers to whom the Claimant referred were in any event senior to the Claimant having regard to the rules for determining seniority.

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<sup>4</sup> *C.O. Williams Construction Ltd v Attorney-General for Barbados* PC Appeal No. 24 of 1995, as applied by Reifer J. in *Franklyn v Permanent Secretary et al* 15 BB 2003 HC 10.

[12] In particular, the rules for determining seniority include the fact that the obtaining of qualifications count towards seniority only in relation to qualifications required for a specific post. In the instant case, the Defendants' position was that albeit the officer referred to obtained the qualification required<sup>5</sup> subsequent to the Claimant, that qualification was not a requisite for the post in they were both employed. As a consequence, the Claimant was not considered senior to the 2<sup>nd</sup> officer he complains as having been appointed ahead of him. Further, the Defendants submitted that there was no record of the other named officer having been appointed to act as alleged. The Defendants therefore did not accept that the Claimant was senior to the officers he specifically mentioned but in any event submit that seniority is only one of several factors, including merit, which determines acting appointments.

## **Discussion**

[13] The Court's consideration of this matter must reflect the unfortunate circumstance of lapse of time.

This judicial review claim was filed in 2009 and it could not be expected that the situation in relation to the occupation of the Claimant's and higher posts in question, would have remained the same. The Claimant by the time of trial

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<sup>5</sup> Associate's Degree in Environmental Health + Certificate of Inspection of Meat and Other Foods

in November, 2020 had been appointed to the post of EHOI, but maintained his claim for review on the basis of the prejudice (to the level of his seniority) and financial loss suffered as a result of the denial of acting appointments. According to the Claimant's case as pleaded, there are only two specific incidents which form the basis of his complaint. The consideration of the Claimant's case, must be restricted to those two instances pleaded of officers who were appointed to act to EHO II ahead of him, albeit the Claimant's view that he was the most senior officer. Further, with respect to the evidence in support of the Claim, the scope of such evidence is restricted to evidence filed prior to the hearing in November, 2020 or evidence filed thereafter with the Court's permission, which is filed directly in support of evidence filed prior to the hearing in November, 2020.

[14] Notwithstanding evidence filed whether prior to or subsequent to the hearing, the Court is in a position to determine this matter taking at its highest, the Claimant's assertion that he was the most senior officer. As a matter of public law, the grounds advanced by the Claimant, (namely legitimate expectation and that the appointments in his stead were arbitrary and unreasonable), need no in depth analysis. The Court is content to accept the authority cited by the Claimant of **Leacock v Attorney-General** as a sound reference from which to extract relevant principles in relation to both grounds. The Court however

wishes to maintain the context of this matter in stark focus. The Claimant's complaint was pleaded in relation to two specific occasions in which he says officers junior to him were allowed acting positions in a higher grade. The Court is more concerned with the appropriateness of the judicial review process having been invoked in the specific circumstances pleaded by the Claimant.

- [15] There is no question that the process of appointment, transfer or promotion of public officers is amenable to judicial review. However, every single situation or circumstance is not necessarily appropriately reviewable by the Court. In this case the process is governed by regulations 12 and 13 of the Service Commissions (Public Service) Regulations, 1978 which provide as follows:-

***“Principles of selection for promotion***

*12.(1) Where a vacancy occurs in the public service, the Commission shall consider the eligibility of all officers for promotion, and in respect of each officer shall take into account not only his seniority, experience and educational qualifications but also his merit and ability.*

*(2) For the purposes of promotion to a post involving work of a routine nature, more weight may be given to seniority than where the work involves greater responsibility and initiative; but merit and ability shall be given more weight progressively as the work involves a higher degree of responsibility and initiative.*

(3) *In the performance of its functions under paragraphs (1) and (2), the Commission shall take into account as respects each officer*

- (a) *his general fitness;*
- (b) *his seniority;*
- (c) *his basic educational qualifications and any special qualifications;*
- (d) *any special course of training which he may have undergone (whether at the expense of the Government or otherwise);*
- (e) *marking and comments made in confidential reports by any Permanent Secretary, Head of Department, or other senior officer under whom the officer has worked during his service;*
- (f) *any letters of commendation in respect of any special work done by the officer;*
- (g) *the duties of which he has knowledge;*
- (h) *the duties of the post for which he is a candidate;*
- (i) *any specific recommendation of the Permanent Secretary or Head of Department for filling the particular post;*
- (j) *the officer's previous employment, whether in the public service or otherwise;*
- (k) *any special report which the Commission may require.*

***Principles of selection for acting appointments***

*13.(1) The procedure for making a recommendation in relation to an acting appointment as a prelude to a substantive appointment shall be the same as that prescribed by regulation 12.*

*(2) Where an acting appointment is to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall as a general rule be the senior officer in the Ministry or Department eligible for such acting appointment.”*

[16] In addition to Regulations 12 and 13 of the 1978 Regulations, appointments and promotions (including acting appointments), are governed by the Recruitment and Employment Code, as contained in Schedule I of the Act, as made applicable by sections 18 and 20 of the Act. Further, section 20 of the Act extends the General Orders to promotions, however, the General Orders do not contain provisions specifically dealing with appointments to acting positions.<sup>6</sup> Lastly in relation to the general provisions applicable to acting appointments, the Recruitment and Employment Code does not specifically address acting appointments, however by its general application, it supplements the Service Commission Regulations,<sup>7</sup> or supersedes them where the latter are inconsistent with the Act.

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<sup>6</sup> Chapter IV of the General Orders contains provisions in relation to salaries and allowances in respect of acting appointments.

<sup>7</sup> Public Service Act, Schedule I – ‘General Introduction’

[17] In relation to its general provisions, the introductory paragraph at the beginning of the Code, as reinforced by paragraphs 3 and 4 thereof, and their corresponding footnotes, place greater emphasis in making appointments (which must include acting appointments), on the importance of merit; but where the nature of the work so requires, consideration is also to be given to seniority and experience. This general emphasis on merit in the Recruitment and Employment Code is different from the terms of Regulation 13, which emphasizes seniority in making acting appointments other than as a prelude to promotion. With respect to the relationship between the Code and the Regulations, the Court considers that Regulation 13 is not inconsistent with the Code, in light of the fact that (unlike Regulations 13), there is no express provision relating to acting appointments in the Code. Further, paragraph 9 of the Recruitment Code permits exceptions to the principles contained in the Code, in respect of filling short term vacancies for no more than three months, where vacancies are being filled from within the Ministry.

[18] Having regard to all of the above provisions, the Court finds that Regulation 13(2) of the Service Commission Regulations, was the provision directly applicable to the Claimant's complaint regarding opportunities for acting in higher posts. Notwithstanding that the Court finds that Regulation 13(2) is not inconsistent with the Code for the reasons stated above, this Regulation must

still be construed with reference to the overarching principles contained in the Code, which as a general rule, place greater emphasis on merit. As a consequence, the general rule of Regulation 13 as regards seniority being the determinant factor in acting appointments (not as a prelude to promotion), must be understood in the context of all other factors being constant, if not equal. In other words, in the absence of merit and ability, it could not be expected that a public officer ought to be selected for even an acting appointment, on the basis of seniority alone. The Court considers therefore, that the Defendants' position that seniority is not the only determining factor in relation to an acting appointment, to be correct, but the general rule, all other factors being equal or even nearly equal, is that seniority should prevail.

[19] Having identified the provisions applicable to the situation at bar, the Court refers to the case of **Ramoutar v Commissioner of Prisons et al**<sup>8</sup> from which there can be extracted some guidance on the judicial approach in relation to similar provisions in Trinidad and Tobago. This is a Privy Council decision concerning a claim for judicial review arising out of non-appointment of a public officer to act in a higher position. The Trinidad & Tobago regulations under consideration in the case are almost, but not entirely similar to Barbados' Regulations 12 and 13. Most importantly however, the

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<sup>8</sup> [2012] UKPC 29

regulations are similar with respect to the distinct difference between appointments on promotion (Barbados' Regulation 12); acting appointments as a prelude to promotion (Barbados' Regulation 13(1)); and acting appointments other than as a prelude to promotion (Barbados' Regulation 13(2)).

[20] The provision in relation to seniority as the general rule being the determinant factor in respect of acting appointments other than as a prelude to promotion was directly under consideration in *Ramoutar*. The ratio of this decision in part supports the Court's approach to the situation at bar, and as such the case is usefully extracted in detail. It is noted for good measure that the claim was really one for permission for judicial review (which was refused), but at first instance and both appellate levels, the application was treated as a 'rolled up' application, and therefore considered on its merits. The facts and reasoning of *Ramoutar* are extracted as follows:-

- (i) The position of Chief Welfare Officer (CWO) of the Trinidad & Tobago Prison became temporarily vacant for a period of three years, whilst the substantive post holder was seconded elsewhere. The vacancy to fill the post therefore existed on an acting basis for three years. In the first instance, the acting position was held by the officer

immediately below the CWO, however that officer was due to leave the service in a few months;

- (ii) The acting position became vacant once more and the claimant Ramoutar, who was a Prison Officer II (the rank immediately below the CWO post), applied for the acting position. The post required a Bachelor's degree in Social Work which the claimant did not possess, however the claimant was the most senior POII after the officer who was first appointed to act left the service;
- (iii) According to the applicable regulations, prior to a vacancy being filled, the Commissioner (of Prisons) was required to submit a list of persons considered suitable for appointment, as well as a list of persons who were senior to those suitable for appointment, but who for whatever reason were not considered suitable. The persons on that second list were to be notified and entitled to make representations to the Commission in relation to the impending appointment. That second list was in effect a list of persons who would possibly be 'bypassed' on the filling of the vacancy (whether acting or substantive);
- (iv) Following this rule, the claimant Ramoutar was included on the second list and notified that because he did not hold the required qualification, he was not eligible to fill the acting post of CWO;

- (v) An officer of the same rank (Prison Officer II), but junior to the claimant, and who did hold the required Bachelor's degree was appointed. It was accepted that the Commission had treated the requirement for the Bachelor's degree as an eligibility threshold, as a result of which the claimant's application had never been considered on its merits;
- (vi) In addition to the Public Service Regulations which were expressed in similar terms to Barbados' 1978 Service Commissions Regulations 12 and 13, the Trinidad & Tobago Public Service Regulations contained a specific Part, which was directly applicable to the Prison Service. In this specific Part, Regulation 26 provided in substance, the equivalent to Barbados' Regulation 13 with direct applicability to the Prison Service. Trinidad & Tobago's Regulation 26 reads as follows:-

*“26.(1) Where an acting appointment falls to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall –*

*(a) as a general rule be the senior officer in the Ministry or Department eligible for such acting appointment;*

*(b) assume and discharge the duties and responsibilities of the office to which he is appointed to act.”*

- (vii) The Privy Council considered the meaning of Regulation 26 and determined that the requirement for the Bachelor's Degree in Social Work, was not a statutory requirement, therefore the claimant's lack of that qualification did not render him ineligible within the terms of Regulation 26, to be considered for acting appointment;
- (viii) In light of the fact that the claimant's application for the acting position had not been considered at all, the denial of his application without it being considered was unlawful as the claimant was in fact eligible to be considered. The absence of the degree might have rendered him unsuitable, but the Commission was obliged at the very least to consider his application.

[21] To be clear therefore, the case of *Ramoutar* is evidently inapplicable to the case at bar on its particular facts, however in coming to its decision, the Privy Council examined the meaning of Trinidad & Tobago's Regulation 26, which is similar to Barbados' Regulation 13. Specifically in respect of Regulation 26, the Privy Council said thus (emphasis mine):-

***"The present issue turns of the meaning of this Regulation. Regulation 26 does not impose an absolute rule of appointment by seniority, but only a "general rule" to that effect. In other words, it is capable of being displaced by other relevant considerations. But this is irrelevant to the issue before the***

*Board. In Mr Ramoutar's case, the general rule of appointment by seniority was not displaced by other considerations. He was not considered at all. The only legal basis on which that could be justified is that although he was the senior officer, he was not "eligible for such acting appointment" within the meaning of Regulation 26(1)(a).*

*Normally the word "eligible" imports a threshold condition of appointability. It does not normally mean "suitable". It means capable of being appointed if found suitable. The position is, however, complicated by the fact that the Regulations do not consistently use the term in its normal sense. In the introductory words of Regulations 18 and 172, it is clear that the draftsman intended "eligibility" to mean the same as "suitability", for the criteria of eligibility which follow all relate to the assessed qualities of the candidate. On the other hand, it is equally clear that Regulation 25, which requires the Permanent Secretary or Head of Department to notify forthcoming acting appointments to all officers within his service "who are eligible for consideration", is referring to eligibility in its normal sense. In the Board's opinion, "eligible" in Regulation 26(1)(a) is used in the same sense. It is a threshold condition of appointability. Otherwise, appointment on seniority would hardly count as the general rule that it is clearly intended to be.*

- [22] From the above extract, the necessary parallels with the Barbados provisions can be drawn so that the distinction between the use of eligible as meaning suitable versus, as a threshold for appointment, can be discerned. The

counterparts to Trinidad and Tobago's regulations 18 and 172, would be contained in Barbados' 1978 Regulation 12 and 13(1). It is deduced that the use of 'eligible' in Regulation 13(2) is the normal meaning thereof, as distinct from 'suitable'. This reasoning accords with the Court's earlier view, that seniority as the determinant factor must be presumed together with all other factors being equal, i.e. that the applicant to an acting position must otherwise be eligible for acting appointment, as well as being the most senior. This position however would thereafter beg the question as to what would be considered the criteria for eligibility for acting appointment? The Privy Council determined that whereas the criteria for substantive appointment or acting appointment as a prelude to substantive appointment was expressly provided<sup>9</sup>, the same criteria were clearly not applicable to acting appointments other than as a prelude to substantive appointment.

[23] It was stated as follows:-

*“...the criteria for making permanent appointments and acting appointments as the prelude to permanent appointments have no application to acting appointments where the person appointed is simply standing in for permanent office-holder. Appointments of the latter kind are subject to a distinct regime. In the case of permanent appointments and appointments intended as the prelude to permanent appointments, seniority is one factor*

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<sup>9</sup> Equivalent to Barbados' 1978 Regulations, Regulation 12(1)(2)&(3)

*among many in the assessment of candidates, but it is never conclusive, and for the more responsible appointments it may be of very limited weight; whereas for purely acting appointments it is stated to be the general rule. This reflects significant differences in the nature of these appointments.”<sup>10</sup>*

It was recognized, that actual criteria for the short term acting appointment, was not specified in the provision, however, appointment was assessed in the following terms:-

*The appointment of a stand-in on an acting basis is essentially an internal reallocation of the duties of existing staff to meet the exigencies of the service. It is temporary. It may fall to be made at short notice and sometimes for short periods. Those who are chosen will necessarily be within the prison service already and have satisfied the criteria for appointment to an office at the next level down. This is, as it appears to the Board, the reason why the Regulations require acting appointments which are the prelude to permanent appointments to be made on the same principles as permanent appointments, but impose no corresponding requirement for the appointment of stand-ins on a purely acting basis...<sup>11</sup>”*

*“...The Board considers that in Regulation 26(1)(a), “eligible” officers are existing officers of the prison service who are capable of performing the duties...”<sup>12</sup>*

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<sup>10</sup> *Ramoutar*, supra @ para 15

<sup>11</sup> *Ibid*

<sup>12</sup> *Ramoutar* supra @ para 18

*“...As between officers who are capable of performing the duties, the most senior is entitled to be appointed unless there are reasons for displacing the “general rule”. The Commission has a very wide discretion to determine what reasons it will regard as sufficient to justify departing from the general rule in a particular case. But this is not a discretion that can be exercised without considering the result of applying the general rule of appointment by seniority. To do that, they must at the very least consider the qualities of the most senior eligible officer.”<sup>13</sup>*

- [24] In the above extracts the Privy Council categorises the acting appointment (other than as a prelude to substantive appointment) as being entirely different in nature to substantive appointments and being subject to an entirely different regime. In particular, that the nature of such acting appointments is that the appointee is in effect only standing in for the permanent office holder, and that such appointments are essentially a reallocation of duties, usually filled from within the particular office. With that categorisation in mind, the Privy Council established that once eligible to stand in, the most senior officer acting would be the general rule unless displaced by other considerations and that whilst the Commission had a very wide discretion in determining what such considerations of displacement would be, the senior officer must still be considered. According to this decision, if the Claimant in the instant case can

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<sup>13</sup> Ibid.

be viewed as the most senior officer in his Department, his complaint regarding not having been first appointed to act, would be well made to the Court and the Defendants would have been obliged to demonstrate some integrity in the process of how the acting appointments of the officers junior to the Claimant was made.

[25] The Privy Council went on to express the following sentiments however, which the Court considers would be well applied to the instant case. It was stated thus:-

*“The courts do not sit as a court of appeal from the decisions of the Commissioner of Prisons or the Public Service Commission, and are in no way concerned with the merits of candidates for promotion or the micro-management of personnel decisions in the prison service. The courts are, however, concerned to ensure that public bodies carry out the functions that the relevant legislation assigns to them.”*

In this case, the application of Regulation 13, must nonetheless be subject to the overall general principle of the Recruitment and Employment Code, which places a premium on merit. In applying Regulation 13, there is a factual question to be answered as to whether the Claimant was the most senior EHAI in his Department, as he alleged. The Defendants submitted he was not and the Court is willing to take this position at its highest, whilst recognizing that the manner of determining who was in fact the most senior amongst the

Claimant and the two officers he complained as having been afforded acting opportunities ahead of him, is debatable according to the evidence. It is accepted, that the Claimant was eligible to be appointed to the acting positions of EHO II given that he possessed the required qualifications for the higher post.<sup>14</sup>

[26] Even taking the Claimant's seniority as accepted, it is the case, that the seniority asserted is not without debate, and in accordance with the reasoning of the Privy Council, the Defendants would have a wide discretion in determining who from the eligible pool of officers to act, would be most suitable to do so, once issues of seniority amongst officers are properly considered.

Were the facts of the instant case such that there was clear and consistent evidence of the Claimant being 'passed over', by plainly junior officers who might have been ineligible to act in the posts complained, or if there were some allegation of *mal fides* by the Defendants towards the Claimant, the Court might have been moved to exercise its supervisory jurisdiction to ensure that the Defendants were not abusing their discretion or otherwise acting unlawfully. In the circumstances before the Court however, the Claimant has

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<sup>14</sup> See fn 5 supra.

not and cannot allege that the officers he feels were junior to him and appointed to act ahead of him were ineligible to do so.

[27] To the contrary, the evidence shows that they were so eligible. Further, the underlying issue of seniority in this case is negligible, as the Defendants have put forward sufficient basis to support a finding that the persons appointed ahead of the Claimant were properly considered senior, according to the rules of seniority. In these circumstances, the Court considers that the particular factual circumstances fall within the Privy Council's categorisation of the court '*not being concerned with the merits of candidates for promotions*' (in this case for acting appointments to a higher post) but more aptly, within the categorisation of the Court '*micro-managing personnel decisions*', in this case of a department within the Public Service.

Whilst the Court will jealously safeguard the rights of litigants to its process and its obligation to protect the rights of litigants, the arena of public law must have practical limitations of what properly engages judicial time and what does not.

[28] Aside from the above sentiments, the Court considers that the Public Service Act, contains a grievance handling procedure enabled by section 12(1) of the Act, thereafter expanded by the Fourth Schedule and engages the employee trade union. Resort to the grievance handling procedure is clearly not

mandatory, but the availability of that procedure was an alternative remedy (the procedure came into effect with the Act in 2007), which amounts to further reason in support of the Court's position that the instant matter would have been best pursued without first resort to the court for judicial review. Regrettably, and the Court says regrettably as its assessment of the Claimant is of a person who genuinely feels aggrieved that he was not treated fairly, the Claimants application for judicial review fails for the reasons stated above, which are summarized hereunder.

### **Conclusion**

[29] The Claim for judicial review of a failure to afford him the opportunity as the most senior Environment Health Assistant II to act in the higher post of Environmental Assistant I or II fails for the following reasons:-

- (i) The disputed existence of seniority between the Claimant and the officers appointed to the act in the higher grade on the two occasions complained of by the Claimant, was negligible at best or debatable at worst;
- (ii) In addition to the tenuous position relating to the seniority asserted by the Claimant, the application of Regulation 13(2), in conjunction with the general principles of the Recruitment and Employment Code, Schedule I of the Act is such that the Defendants would have had a wide

discretion to determine whether the most senior person to act was the most suitable person to act, in the higher position;

- (iii) Given the wide remit to which the Defendants are entitled to make decisions as to the merits of candidates for appointment, and the undesirability of the Court unnecessarily overreaching its supervisory jurisdiction into areas of personnel management and administration, the Court is of the view that the Claimant's complaint does not properly engage the Court's remit to exercise supervision of the administrative process in question;
- (iv) Further to (iii) above, the Claimant had available an alternative remedy (the grievance procedure) which could have been pursued, before engaging the Court on the matter.

### **Disposal**

[30] The following orders are therefore made on disposal of the Claim for judicial review:-

- (i) The Claim for judicial review is dismissed;
- (ii) There is no order as to costs.

**SHONA O. GRIFFITH**  
Judge of the High Court